85-542

No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

JOHN ROTH, ONA ROTH, SONOMA INVESTMENT CORPORATION, LEWIS BROWN, DOROTHY JEAN BROWN,
Petitioners,

VS.

CITY OF VALLEJO,
Respondent.

On Writ of Certiorari
To the Court of Appeal of The State of California

PETITION FOR WRIT OF CERTIORARI

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58 pp

QUESTIONS PRESENTED

1. May a city restrictively zone adult bookstores and theaters based upon the content of the materials sold and exhibited therein, and require existing such businesses to relocate, without a factual showing that its zoning scheme is necessary to and is the narrowest least onerous alternative regulation of those businesses which will obviate the alleged adverse effects of such businesses?

2. May a city rely on the experience of other cities in fashioning restrictive zoning laws for adult businesses without a factual showing that the conditions and characteristics of the cities relied upon are sufficiently similar to justify such reliance?

3. If a city adopts restrictive zoning which limits where bookstores and theaters which sell non-obscene sexually explicit material may locate, and requires existing such businesses to relocate, does it bear the burden of establishing that suitable locations are available for such businesses?

4. a) Is an ordinance which defines as "adult" all books and films which depict "sexual excitement" or "sexual conduct", or certain specific acts, unconstitutionally vague or overbroad or both?

b) Does such an ordinance give unfettered discretion to zoning officials to determine if businesses selling such materials are "adult" and, therefore, give such officials unconstitutionally overbroad discretion to control the location of such businesses?

5. Is an ordinance which restrictively zones bookstores and theaters if 25% or more of their stock depicts "sexual excitement" or "sexual conduct" constitutionally overbroad?

6. Does the Vallejo zoning ordinance here in question, as applied in this case, significantly restrict access to non-obscene sexually explicit books and films?

PARTIES

The caption of the case in this court contains the names of all parties.

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On Writ of Certiorari
To the Court of Appeal of The State of California

PETITION FOR WRIT OF CERTIORARI

Petitioners John Roth, Ona Roth, Sonoma Investment Corporation, Lewis Brown and Dorothy Jean Brown pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California entered in this proceeding on April 25, 1985.

OPINION BELOW

The opinion of the Court of Appeal appears in the Appendix hereto. It is officially reported at 167 Cal.App.3d 1169. No opinion was rendered by the trial court herein.

JURISDICTION

The judgment sought to be reviewed was made and entered on April 25, 1985. A petition for rehearing in the Court of Appeal was timely filed and was denied on May 22, 1985.

A Petition for Review was timely filed in the California Supreme Court and was denied on July 17, 1985. The California Supreme Court is the highest state court in which decision could be had.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND ORDINANCES

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

City of Vallejo Zoning Ordinance, Sections 16.04.011 and 16.04.012:

> 16.04.011 Adult bookstore.
>
> "Adult bookstore" means any commercial establishment that has twenty-five percent or more of its stock in books, magazines, photographs, drawings, motion pictures, films or other visual representations which describe or depict sexual intercourse, homosexual acts, masturbation, fellatio, cunni-

lingus, bestiality, sodomy, sadomasochistic abuse or other sexual excitement or sexual conduct.

16.04.012 Adult theater.

"Adult theater" means any establishment which shows or provides for a fee films, twenty-five percent or more of the number of which depict or show any of the acts described in Section 16.04.011. This includes any video tape system or film cartridge system which displays on a viewer, screen, or television set. This section includes any motel which provides any such films, video tape, cartridges, or other viewing system for the use of guests or customers in individual rooms, or otherwise.

Other pertinent parts of the Vallejo Zoning Code are contained in the Appendix.

STATEMENT OF THE CASE

I

On June 5, 1980, respondent City of Vallejo filed an action to enjoin petitioners from operating an "adult" bookstore and theater at a specific location in violation of the Vallejo Zoning Ordinance. (C.T. 2).

Petitioners answered, asserting, *inter alia,* that the Vallejo Zoning Ordinances regulating adult bookstores and theaters were unconstitutional (C.T. 44.)

The case was tried on September 23, 1982. After submission of trial briefs, the Court granted a permanent injunction prohibiting petitioners from operating an adult bookstore or theater at the location in question.

Judgment was entered on December 7, 1982. Notice of Appeal was timely filed on January 18, 1983. The subsequent history is stated under the Jurisdiction section, above.

II

The stages in the proceedings at which the federal questions sought to be reviewed were raised and the methods of raising them are as follows:

(a) by Request for Statement of Decision filed at the commencement of the trial. This Request is contained in the appendix hereto.

(b) by Argument in the trial brief filed after the close of evidence, portions of which are contained in the appendix hereto.

(c) by a Second Request for Statement of Decision (identical to the first) filed after the close of evidence.

(d) by objections to the Statement of Decision filed after its issue. The objections are contained in the Appendix.

(e) in the California Court of Appeals, by argument in the brief to that court, portions of which are contained in the appendix hereto.

(f) by argument in a Petition for Review filed with the California Supreme Court, portions of which are in the appendix.

The trial and appellate courts disposed of the federal questions by holding the Vallejo Ordinance provisions to be constitutional.

III

THE FACTS

A

The City of Vallejo has passed zoning ordinances which restrict the operation of certain businesses, known as "adult bookstores" and "adult theaters," to parts of certain specific zones within the City and which exclude such businesses from all other areas within the City. The ordinances are set forth above and in the Appendix.

Adult bookstores and adult theaters must be located within the C-L, the C-P, or the I-U zones of the City (C.T. 150-159). However, even within those areas, an adult business may not be located within 1,000 feet of another adult use or within 500 feet of any residentially zoned district or the property line of any school, library, park, or playground (C.T. 166, R.T. 15).

The City's justification for this restrictive legislation is contained in Ordinance 16.82.060 (C.T. 166, R.T. 15):

> The City council finds that adult bookstores and adult theaters . . . have an adverse impact on the tone of commerce in the city generally. They cause mental distress and anguish to nearby residents; they attract undesirable persons who pose dangers to school children and who interfere with adjoining businesses; adult bookstores, when placed on major thoroughfares, tend to downgrade the image of the City and to make it a less desirable place to work and live.

Appellants operate a bookstore and theater in the City of Vallejo which sells sexually graphic non-obscene adult material (R.T. of May 7, 1981, 36-37).

B

No evidence was introduced which showed that any of the assertions in the "findings" of Ordinance 16.82.060, quoted above, were true in the City of Vallejo. There was no evidence that the City Council ever undertook any factual investigation to determine what problems existed, if any, because of the presence of petitioners' or any other adult business, or what zoning or other controls if any, were necessary to control any problems that existed. Lastly, there was no evidence that the City did any investigation to determine the impact of various zoning alternatives on the public's access to adult sexual material.

C

Most of the trial consisted of the introduction of evidence on the issue of whether the Vallejo Ordinance greatly restricted or suppressed access to legal sex-related materials.

John Flanders, a real estate broker with extensive experience dealing with adult bookstores and in determining advantageous adult bookstore locations, qualified as an expert on the subject (R.T. 27). He described a survey which he conducted (R.T. 74 et seq.).

To conduct the survey, Mr. Flanders obtained a map of the City, color coded the zones within those adult businesses could locate, and then marked off the areas within the zones from which adult uses were excluded because of proximity to some other use or zone. The map then showed legal locations (R.T. 74-77). Mr. Flanders went to all those legal locations shown on the map and determined what was at those locations (R.T. 77).

Mr. Flanders described the needs of a retail adult store as requiring good vehicular and pedestrian traffic exposure, approximately 1,000 to 2,000 square feet of space, and the ability to place appropriate signs. With these criteria in mind, Mr. Flanders reviewed all available locations for feasible relocation (R.T. 78).

One of the areas zoned for adult businesses was the downtown area zoned C-P. Mr. Flanders found no feasible locations in this downtown area (R.T. 88, 116). Irrespective of the availability of locations in the downtown area, another adult bookstore, Bachelor Books, exists in this downtown area in such a location that the entire remaining downtown area is unavailable for any other adult business (R.T. 29, 115). This is because all other locations in the C-P area are within 1,000 feet of Bachelor Books.[1]

In the remaining two zones in which adult businesses might be located, Mr. Flanders found ten possible sites (R.T. 118). However, after investigation, each of these sites was determined to be either unavailable for rental, unavailable for rental as an adult use, too big, without pedestrian traffic or dilapidated (R.T. 83-118).

No locations for a normal sit-down standard theater were found where adult films could be shown.

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[1] The City also filed suit to close down Bachelor Books.

The City did not dispute that most locations were not available for adult use. The City, however, asserted that three sites were available for bookstore use:

1. A location in Larwin Plaza, a shopping center (R.T. 21).

2. Sites in Vallejo Industrial Park (R.T. 121).

3. An empty Texaco gas station (R.T. 124).

The testimony regarding these three sites was as follows:

1. Donald Ruby, a member of the Vallejo Management Company that acted as a leasing agent for the Larwin Shopping Center space, testified that the owners of Larwin Shopping Center *refused to rent space to an adult bookstore* (R.T. 38).

2. Melvin Hanson, a real estate broker in Vallejo, testified that the only available space in the Vallejo Industrial Park had 2,134 square feet making it *too large* for an adult bookstore or theater (R.T. 39). In any event, *the space is industrial, not commercial.*

3. The Texaco station would require extensive renovation and the building design was not suitable for a bookstore. In any event, Texaco indicated *it would not rent to an adult user* (R.T. 108).

The City suggested several other locations which it had found to be vacant (R.T. 17-18). *But there was no testimony that any of those locations were available or suitable for a retail store or an adult business.*

Appellants also presented testimony that Mr. Flanders contacted a local Vallejo realtor with 25 years' experience, Frederick Sessler. Mr. Sessler could only suggest one vacant, 4,000 foot location which needed substantial remodeling, the cost of which was prohibitive (R.T. 45). In any event, Mr. Sessler was unable to testify that the location was available.

The City also suggested:

1. that adult businesses could construct their buildings (R.T. 10), and

2. that adult businesses could locate on the second floor of downtown buildings (R.T. 22).

In response to the suggestion that adult businesses construct their own buildings, Mr. Flanders testified that the purchase price of a vacant lot in the area would be $30,000 to $60,000 (R.T. 98). Mr. Flanders estimated that it would cost approximately $120,000 (at $60.00 per square foot) to construct a 2,000 square foot cinder block building in compliance with the Vallejo building code (R.T. 97). Most financial institutions require a 50% cash investment in such projects (R.T. 97). Under these circumstances, Judge McInnis, the trial judge, agreed that an adult business operator should not be expected to develop vacant land (R.T. 112).

As to the second floor suggestion, Mr. Flanders testified that if such space were available in Vallejo, it would be unsuitable because, among other reasons, the cost of complying with the Handicapped Access Regulations of Part 2 of Title 24 of the California Administrative Code, especially Section 2.105(B)(1), would be prohibitive. As with its other suggestions, the City failed to introduce any evidence that second story space was suitable for adult bookstores in Vallejo. In any event, any vacant second story space is located in the downtown area, which is unavailable because of the presence of Bachelor Books within 1,000 feet.

REASONS FOR GRANTING THE WRIT

I

THE WRIT SHOULD BE GRANTED TO RESOLVE CONFLICTS BETWEEN THE CALIFORNIA APPELLATE COURTS, ON THE ONE HAND, AND THE FEDERAL COURTS OF APPEAL AND THIS COURT, ON THE OTHER, CONCERNING THE INTERPRETATION AND APPLICATION OF THIS COURT'S HOLDINGS IN *YOUNG v. AMERICAN MINI-THEATRES, INC.*, 427 U.S. 50 AND *SCHAD v. BUROUGH OF MT. EPHRAIM*, 452 U.S. 51

In *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976) this Court upheld a zoning ordinance which regulated the location of businesses selling or exhibiting books, films or magazines of a sexual nature. A plurality of the Court felt that the ordinance in question was not unconstitutional because, despite the application of the ordinance, the market place for adult fare was substantially untouched. That plurality of four justices held, however, that:

> The situation would be different if the ordinance had the effect of suppressing, or greatly restricting access to lawful speech. *Id.* at 72, note 35.

Justice Powell concurred, believing that the four-pronged test of *United States v. O'Brien*, 391 U.S. 367 (1968), was applicable. *Young v. American Mini-Theatres, supra*, at 80. Thereafter, in *Schad v. Burough of Mt. Ephriam*, 452 U.S. 61 (1981), this court struck down a municipal zoning ordinance which regulated live entertainment. The court carefully reviewed the ordinance and its asserted justifications, pursuant to the tests set forth in *American Mini-Theatres* and *O'Brien*, and concluded that the ordinance was unconstitutional.

Both the analytical framework and the holdings of *American Mini-Theatres* and *Schad* have been ignored by the California appellate courts, as most recently exemplified by this case. On the other hand, those federal appellate courts which have considered problems of the zoning of adult businesses have, with rare exception, uniformly followed this Court's dictates. The following

discussion set forth the conflicts between this Court's doctrine, the approach and holdings of the federal courts of appeal and the California appellate courts.

A. Both in *American Mini-Theatres* and *Schad,* this Court required the municipalities involved to produce *evidence* to justify their ordinances. In *American Mini-Theatres,* this Court specifically found that the record disclosed a factual basis for Detroit's conclusion that the zoning scheme it adopted would solve actual problems. *Id.,* at 71, 82. Justice Powell specifically referred to reports and affidavits which were before the Detroit Common Council. *Id.,* at page 81, note 4. *Schad* recognized and commented on the fact that the *American Mini-Theatre* court had dealt with a case in which evidence was presented to the Detroit Common Council sufficient to support its conclusion. In *Schad,* the ordinance was struck down specifically because no evidence was presented by the Burough in support of its claimed justifications for its ordinance. *Id.,* at 72, 73.

The federal courts of appeal have required factual showings sufficient to support a city's assertion of civic harm. An empty record was responsible in part for the Fifth Circuit ruling in *Basiardanes v. City of Galveston,* 682 F.2d 1203, 1215 (5th Cir. 1982). The Eighth Circuit required evidence to be presented to justify municipal restrictions in *Avalon Cinema Corporation v. Thompson,* 667 F.2d 659, 661, 662 (8th Cir. 1981) (In Bank). The Ninth Circuit, in *Kuzinich v. County of Santa Clara,* 689 F.2d 1345 (9th Cir. 1982) and in *Playtime Theatres, Inc. v. City of Renton,* 748 F.2d 527 (9th Cir. 1984), (probable juris. noted, 53 USLW 3739) has specifically required that evidence be presented by a local municipality to justify its ordinance. The First Circuit, in *Fantasy Bookshop, Inc. v. City of Boston,* 652 F.2d 1115, 1125 (1st Cir. 1981) remanded for factual findings regarding the city's assertion of harm. And, lastly, the Sixth Circuit in *Keego Harbor Co. v. City of Keego Harbor,* 657 F.2d 94, 98 (6th Cir. 1981) held that the City of Keego Harbor failed

to factually support its claimed justifications for its ordinance. See also *CLR Corporation v. Henline,* 702 F.2d 637 (6th Cir. 1983).[2]

The California Court of Appeals in this case, in contrast, specifically held that the City of Vallejo was not required to present *any* factual basis to support either the assertion that it had substantial governmental interests which supported its ordinance or that those interests could be served by no means less intrusive on activity protected by the First Amendment:

> Appellant, however, complains that respondent has failed to show any factual basis for its finding or otherwise support its claimed purpose by proof in the record. *The law does not require such proof.* The justification for zoning laws locating adult businesses in specified areas can be based upon past experience and evidence offered in similar cases. (Court of Appeals Opinion, page 11.) (Emphasis added)

This is not the only California case to so hold. See also *Strand Property Corporation v. Municipal Court,* 148 Cal.App.3d 882 (1983). It is thus clear that California courts do not intend to require any municipality in California to present independent evidence of harm sufficient to justify an adult business zoning ordinance.[3]

The holding in this case is directly in conflict with the holding in *Playtime Theatres v. Renton, supra.* The Ninth Circuit in *Playtime* specifically held that Renton could not justify its ordi-

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[2] While not specifically a ground for certiorari, it should be noted that the federal district courts have regularly rejected ordinances which lack factual evidence of their necessity. See, e.g., *Norse Street Book Shoppe v. Village of Endicott,* 582 F.Supp. 1428 (N.D.N.Y., 1984), *E & B Enterprises v. City of University Park,* 449 F.Supp. 695 (N.D. Texas, 1977), *El West Stereo Theatres, Inc. v. Byrd,* 472 F.Supp. 702 (N.D. Texas, 1979).

[3] In fact, neither the City of Vallejo nor the Court of Appeals cited any case in which past experience and evidence was similar to the situation in Vallejo. *Strand Property Corporation, supra,* involved a ruling on a demurrer and as such, no factual record was created. *County of Sacramento v. Superior Court,* 137 Cal.App.3d 448 (1981), also cited by the California Court of Appeals, does not deal with zoning.

nance by relying on the experience of other towns and cities. *Id.*, at 536.

Zoning is uniquely a local function. A municipality is given the power to zone; the power, historically, has been kept on the local level so that the unique configurations and problems of each small geographic area can be considered. The holding in this case has destroyed that concept.

B. In both *American Mini-Theatres* and *Schad*, this Court placed the burden of proving that the ordinance did not suppress or greatly restrict access to lawful speech, and the burden of proving that the various elements of the *O'Brien* test were met, on the municipality. Federal courts of appeal have been zealous to impose the same requirements. Thus in *Playtime Theatres v. Renton, supra*, the Ninth Circuit specifically held that Renton bore the burden of proving that the elements of the *O'Brien* test mandated in *Schad* were satisfied. *Playtime Theatre, Inc. v. City of Renton, supra*, at 535.

In *Kuzinich v. County of Santa Clara, supra, Ebel v. City of Corona*, 698 F.2d 390, 393 (9th Cir. 1983), *Fantasy Bookshop, Inc. v. City of Boston, supra, Basiardanes v. City of Galveston, supra, Avalon Cinema Corporation v. Thompson, supra, Keego Harbor Co. v. City of Keego Harbor, supra*, and *CLR Corporation v. Henline, supra*, the federal courts of appeal uniformily placed the burden of proof upon the municipality.

In contrast, the California courts, as exemplified by this case, have placed the burden on the businessman who asserts his First Amendment rights.

The California Court of Appeals in this case certainly paid repetitive lip service to the holdings of this Court. However, the California court in fact required petitioners to demonstrate that there were no available locations. This becomes obvious from a reading of page four of the opinion in which the court found that *petitioners* had failed to establish that certain locations were "unavailable or unsuitable for adult uses". Further, at page 15 of the opinion, the court held that *petitioners* had failed to establish that *they* were unreasonably restricted from successfully operating within the city limits.

The California Court of Appeals frankly failed to apply the test set forth in *Schad v. Burough of Mt. Ephriam, supra.* The California Court held, in effect, that so long as petitioners did not prove that the City of Vallejo acted from improper motive (opinion, page 11), and so long as the City of Vallejo did not impose an outright ban on adult businesses (opinion, page 15), the ordinance was acceptable. Moreover, the court defined the test as solely whether *petitioners* could find a location instead of looking to the impact of the ordinance on the entire market. As noted above, the court avoided discussion of a factual justification for the ordinance by holding the same was not necessary. The court also avoided discussion of the existence of other less onerous alternatives such as increased police surveillance, lighting, and cosmetic renovation of store fronts and signs, by ignoring the issue.

Each of the federal courts cited above, as well as this Court, have taken a different approach, an approach which strictly scrutinizes each ordinance, its justifications, and its impact.

The California Court of Appeals recognized that the City of Vallejo's ordinance was facially more restrictive than the Detroit zoning ordinance in *Young.* The court recognized that an adult business was prohibited not only within 1,000 feet of another such business, but was limited to three specified zoning districts and could not operate within 500 feet of numerous other uses. The court further noted that the Vallejo ordinance did not permit pre-existing nonconforming uses to continue operation as did the *Young* ordinance and as do most of the zoning regulations enacted pursuant to *Young.* Nevertheless, despite clear recognition that the Vallejo zoning ordinance was more restrictive than that in *Young,* the California court upheld it. Petitioners believe the court did so because it failed to recognize this Court's definition of what constitutes a truly suspect ordinance. This Court and all the federal courts which have considered the problem have recognized that ordinances which regulate the locations of adult businesses do so specifically because of their content and therefore must be carefully viewed. But, while setting forth the black letter laws concerning the subject, the California Court of Appeal treated the Vallejo ordinance differently. Petitioners believe that

the key to the difference in approach and result can be found in the Court of Appeal's statement that the Vallejo ordinance

> ..... is a *content-neutral regulation* of the time, place and manner of protected speech, not a direct abrogation or infringement of First Amendment rights. (opinion, page 15) (Emphasis added)

The California Court of Appeals upheld the Vallejo ordinance even though practical effect of the ordinance was to cause all the existing adult business to stop business or move, and even though the ordinance zoned the city in such a way that there were no locations for adult sitdown theatres and no available locations for adult bookstores. Even if one were to assume that all of the locations suggested by the city at trial were available, a point on which the city introduced no evidence, the affirmance in the instant case stands in sharp contrast to the rulings of the federal courts of appeals and district courts which have struck adult zoning ordinances even those ordinances did not impose an outright ban, a result apparently demanded by the California Court of Appeals before it will strike an adult ordinance. Among those cases striking ordinances as unduly restrictive because they provided an inadequate number of locations are *Keego Harbor Co. v. City of Keego Harbor, supra; CLR Corporation v. Henline, supra; Avalon Cinema Corporation v. Thompson, supra; Alexander v. City of Minneapolis, supra; Basiardanes v. City of Galveston, supra; Bayside Enterprises, Inc. v. Carson,* 450 F.Supp. 696 (M.D. Florida, 1978); and *Purple Onion, Inc. v. Jackson,* 511 F. Supp. 1207 (N.D. Georgia, 1981).

Thus, it is now clear that California has elected to follow its own path in the regulation of businesses which sell and display sexual material protected by the First Amendment. In order to correct this constitutional aberration and to make it clear that California courts must conform to this Court's holdings as interpreted and applied by the federal courts of appeal, certiorari should be granted.

II

THE WRIT SHOULD BE GRANTED TO DETERMINE WHETHER MUNICIPALITIES MAY REGULATE BOOKSTORES AND THEATRES IF LESS THAN A PREPONDERANCE OF THE MATERIAL WHICH THEY SELL AND EXHIBIT DEPICTS MATERIAL DEFINED AS THAT WHICH RELATES TO "SEXUAL EXCITEMENT" OR "SEXUAL CONDUCT"

Because of the holding in the present case, California municipalities may now regulate, through zoning laws, businesses which sell or exhibit material containing matter having to do with "sexual excitement" or "sexual conduct" where less than a preponderance of the material in such businesses meets those criteria. It has been petitioners' contention and continues to be their contention that such an ordinance is both vague and overbroad to the degree that it substantially threatens constitutionally protected speech and expression in a real and substantial manner. The ordinance is so vague and far reaching that it is likely to cause persons who might otherwise wish to do so to refrain from selling matter containing information related to "sexual excitement" or "sexual conduct" so that they would clearly not come within the ordinances reached.

A superficial reading of the Court of Appeals' opinion might make it appear that the court correctly ruled that petitioners lacked standing to complain about the vagueness and overbreadth of the ordinance because they conceded that they came within its reach and that, in any event, the Court of Appeals properly narrowly construed the ordinance to avoid its constitutional problems. However, neither is the case; presently the Court of Appeals' opinion is support for the proposition that ordinances regulating stores because of the content of a small percentage of their material and ordinances which define adult businesses as those containing materials having to do with "sexual excitement" and "sexual conduct" are constitutionally permitted.

When this case started, petitioners were faced with an ordinance which brought within its reach all books, magazines and films which contained any material having to do with "sexual

excitement" or "sexual conduct". If 25% of such material was present in the business, then the store was "adult" under the Vallejo ordinance. Petitioners did not argue with the assertion that they came within the ordinance *as drafted* in order to save days of court time in which all of the material in their store would be reviewed to determine which publications contained anything having to do with "sexual excitement" or "sexual conduct" and then counting them to determine if the correct percentage was reached. Nowhere in the record did petitioners concede that they would be within the ordinance's reach if the terms "sexual excitement" and "sexual conduct" were stricken from the ordinance and their materials were judged merely by the objective definition which remained. Nowhere did petitioners concede that they would come within the ordinance's reached if the ordinance required a preponderance of material to be present before a business was labeled as "adult".

However, the Court of Appeals, in refusing to confront the serious problems presented by the ordinance, found that petitioners lacked standing to attack it. As will be shown immediately hereafter, the Court of Appeals did this by mischaracterizing the ordinance and, while appearing to merely construe it, instead ignored and evaded the issues presented by petitioners.

First it must be noted that the Court of Appeal has ruled that the Vallejo ordinance, as construed, is a law which *precisely proscribes conduct.* (Opinion, pages 5-8.) Of course, when the litigation started, the ordinance had never been construed. The Court of Appeals was able to hold that petitioners had no standing only after it narrowed the ordinance in one respect. However, careful reading of the opinion at pages 7 and 8, shows that the Court of Appeal did not in fact meaningfully narrow the ordinance. The Court merely suggested that the list of specific acts set forth in the ordinance could be used to provide guidelines to determine to what the terms "sexual excitement" or "sexual conduct" meant. Exactly how the specifically enumerated acts are to guide officials in determining what the two ambiguous terms mean is not suggested by the court and the reading of the first sentence on page 8, which states that ambiguities can be clarified by a narrowing construction in some other future case gives no

direction to officials and places no limits on the terms used in the ordinances.

Petitioners know of no case which has approved language as broad as that contained in the Vallejo ordinance.

Because the terms "sexual excitement" and "sexual conduct", in this context are both vague in the due process sense in that they fail to give notice of what is regulated, *Graynerd v. City of Rockford*, 408 U.S. 104 (1972) and in a First Amendment sense, because of its potentially inhibiting effect on speech, *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976), the ordinances pose a real and substantial deterrent to the exercise of constitutionally protected speech. This court should thus grant certiorari and hold the ordinance to be unconstitutional.

In addition to its vagueness, the ordinance is also overbroad. The Court of Appeals failed to deal with this issue at all.

The ordinance is overbroad because it regulates businesses having only 25% of their material as that containing something having to do with "sexual excitement" or "sexual conduct", in the absence of evidence that it is necessary to control such businesses in order to carry out legitimate government goals. As noted earlier, the City of Vallejo has made no attempt to justify its zoning restrictions on a factual basis. It merely codified general goals and drew broad conclusory statements without factual support. For example, the assertion that such stores and theatres adversely affect "the tone of commerce in the city, generally" is a mere opinion unsupported by evidence. And, if such stores do affect the tone of the city, this ordinance does not solve any problems caused thereby because it merely moves the stores to different locations within the city. Since the adult stores may still operate in the city, the "tone of commerce" would still be adversely affected. Since the stores may operate, nearby residents will still undergo "mental distress and anguish". And, of course, there has been no evidence that the anguish and distress is relieved with a 500 foot rule, but would not be so relieved with a 200, 300 or 400 foot rule.

Perhaps even more important is the fact that there has been no evidence developed in any of the reported cases which suggest

that a store with less than a preponderance of its material meeting the definition of "adult" causes problems which need to be solved by rezoning.

If there were some justification for regulating stores which sell material related to sex, even though it be less than a preponderance of their goods, there has never been a showing that problems of blatant deterioration could not be solved by regulation of massage parlor and encounter studios and other non-first amendment businesses where there is a physical interaction and contact between members of the opposite sex. There has never been any showing that controlling the characteristics of adult business establishments, such as preventing glaring signs, window displays, or "barkers" in front of the businesses would not solve the problems that might occur. The value of police street patrol has never been explored.

In short, the California Court of Appeal has run slipshod over the requirements of this Court that constitutional adjudication involving First Amendment materials and businesses concern itself with particular facts. If the present California case is permitted to stand, it will, frankly, render further litigation in this area, within the State of California and elsewhere, pointless from the adult business owners point of view. Municipalities will be able to pass broad, vague ordinances which will be upheld in court merely by a citation of some other opinion interpreting some other ordinance. In order to avoid this result and to make adjudication in this field meaningful, certiorari should be granted.

Date: September 27, 1985

Respectfully submitted,

ARTHUR WELLS JR.
WELLS & SHIFFMAN, INC.
254 Sutter St., Suite 425
San Francisco, CA 94108
A Professional Corporation

(Appendices follow)

Appendix

In the Court of Appeal of the State of California

First Appellate District

Division One

AO21042
Sup.Ct.No. VO2157

City of Vallejo,
Plaintiff and Respondent,

vs.

Adult Books, Etc., et al.,
Defendants and Appellants.

[Filed April 25, 1985]

Since at least July 1, 1976, appellants have conducted a business of selling adult books and showing adult movies at 540 Georgia Street, Vallejo, California.[1]

In February of 1978, respondent city council, perceiving an "adverse impact" upon the city from "adult bookstores" and "adult theatres" (Vallejo Municipal Code, § 16.57.020 Q), enacted ordinance no. 411 1 V.C. (2d) (hereafter the "ordinance"), which provides that such establishments, defined elsewhere in the ordinance, can be located only in three zoning districts: Linear Commercial Districts (C-L); Pedestrian Shopping and Service Districts (C-P); and Intensive Use Districts (I-V). The ordinance also directs that no "adult bookstore" or "adult theatre" may be located within 500 feet of a residential zone, park, playground, library or school, or within 1000 feet of another such business.

Additionally, as originally enacted the ordinance required adult bookstores and adult theatres to obtain conditional use permits, obtainable only upon a showing that the business was "compatible

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[1] While a number of appellants have joined in this appeal, we will hereafter refer to the appealing parties in the singular to describe the business affected by one ordinance here under scrutiny.

with adjacent uses" and consistent with the city's general plan. After trial of this action, respondent amended the ordinance to eliminate the permit requirement. (Vallejo Municipal Ordinance No. 693 N.C. (2d).)

The ordinance requires "adult bookstores" and "adult theatres" in operation as of its effective date to comply with the new zoning provisions within one year, but allowed the city's planning commission to grant a one-year extension upon a showing of extreme hardship.

Appellant's business location is both within 500 feet of a residential zone and 1000 feet of another "adult bookstore," Bachelor Books.[2] Appellant has neither brought an action to contest the ordinance nor sought a zoning variance. Nevertheless, apellant admits for purposes of testing the constitutional validity of the ordinance that they "meet the definition of 'adult' use set out in the (ordinance)."

At trial, appellant offered the testimony of John Flanders, a real estate broker and qualified expert on commercial property, who conducted a survey to determine locations for adult bookstores and adult theatres which are both legal under the ordinance and economically feasible. According to Flanders, the three-block downtown area, although zoned C-P and containing a few available sites, cannot accommodate appellant's business due to the presence of another adult bookstore, Bachelor Books, within 100 feet of all other downtown businesses.

In the remaining districts zoned to accommodate appellant's enterprise under the ordinance, Flanders found a number of legally available sites in south and northwest Vallejo. But in Flanders' opinion, none of these locations would be economically feasible for an adult theatre or adult bookstore. Each of the legally available sites was, according to Flanders, either unavailable for rental, without sufficient pedestrian traffic to attract customers, or lacking a building suited to appellant's business. Flanders also

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[2] Bachelor Books and Funville Amusement Theatre and Bookshop are apellants in another action before this Division (AO14416) in which the ordinance is challenged on constitutional grounds.

testified that it would not be economically feasible for an adult theatre or adult bookstore to purchase a vacant lot and construct its own building in compliance with the Vallejo building code.

On the other hand, a number of legally available and vacant sites in the Larwin Shopping Center, Vallejo Industrial Park, and the downtown area were suggested by respendent. While the evidence indicates that the owners of many legal sites, such as in the Larwin Plaza Shopping Center, would not rent space to an adult bookstore or adult theatre, other permissible locations were not, at least according to our review of the record, established as unavailable or unsuitable for adult uses.

Appellant has challenged the constitutionality of the ordinance on grounds that it is vague and violative of the First Amendment. Appeal has been taken from a judgment of the trial court upholding the constitutionality of the ordinance.

Appellant complains that the ordinance is unconstitutionally vague. The new zoning provisions apply to "adult bookstores" and "adult theatres," terms which appellant argues are not defined with sufficient certainty in the ordinance.

The ordinance, in section 16.04.011 of the Vallejo Zoning Code, defines "adult bookstores" as follows: " 'Adult bookstore' means any commercial establishment that has twenty-five percent or more of its stock in books, magazines, photographs, drawings, motion pictures, films or other visual representations which describe or depict sexual intercourse, homosexual acts, masturbation, fellatio, cunnilingus, bestiality, sodomy, sadomasochistic abuse or other sexual excitement or sexual conduct. (Ord. 558 N.C. (2d) Sec. 2 (part), 1980."

An "adult theatre" is defined in section 16.04.12 as "any establishment which shows or provides for a fee, films, twenty-five percent or more of the number of which show any of the acts described in section 16.04.011. This includes any video tape system which displays on a viewer, screen, or television set. This section includes any motel which provides any such films, video tape, cartridges, or other viewing system for the use of guests or customers in individual rooms, or otherwise."

Respondent contends that appellants, having admitted that their business falls within the definitions of "adult bookstore" and "adult theatre," lack standing to challenge the ordinance on vagueness grounds.

It is the rule that a litigant whose conduct is precisely proscribed by a statute has no standing to argue that the law is vague as applied to others. (*Basiardanes v. City of Galveston* (5th Cir. 1982) 682 F.2d 1203, 1210; *Duffy v. State Bd. of Equalization* (1984) 152 Cal.App.3d 1156, 1171; *Gates v. Municipal Court* (1982) 135 Cal.App.3d 309, 312-313.) As noted in *In re Cregler* (1961) 56 Cal.2d 308, 313, "one will not be heard to attack a statute on grounds that are not shown to be applicable to himself and that a court will not consider every conceivable situation which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations." (See also *Gates, supra,* at pp. 312-313.)

An exception is recognized if the statute "may cause persons not before the Court to refrain from engaging in constitutionally protected speech or expression." (*Young* v. *American Mini theatres* (1975) 427 U.S. 50, 60; see also *Ghafari* v. *Municipal Court* (1978) 87 Cal.App.3d 255, 263.) The First Amendment standing exception applies only if the statute's deterrent effect on legitimate expression is " 'both real and substantial,' " and if the statute is not " 'readily subject to a narrowing construction by the state courts.' " (*Young, supra,* at p. 60; see also *Erznoznik* v. *City of Jacksonville* (1975) 422 U.S. 205, 216; *Purple Onion, Inc.* v. *Jackson* (N.D. Ga. 1981) 511 F.Supp. 1207, 1218.)

The language of the ordinance which appellant challenges is the phrase "other sexual excitement or sexual conduct." Appellant maintains that such language, used together with other specifically identified sexual acts to describe the nature of "visual representations" which, if found to comprise 25 percent or more of a merchant's stock, qualifies the business as an "adult bookstore" or "adult theatre" under the ordinance, is impermissibly vague.

In *Young,* a vagueness challenge was made to ordinances which classified a theatre as "adult" if it presented " 'material

distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specific Sexual Activities" or "Specified Anatomical Areas" [as specifically defined elsewhere in the law].' " (*Id.*, at p. 53.) The court found that the phrase "characterized by an emphasis" on sexually explicit activities would not have a sufficient deterrent effect upon the exercise of protected expression to permit a party plainly falling within the coverage of the ordinances to assert a vagueness challenge. The court explained: "For most films the question will be readily answerable; to the extent that an area of doubt exists, we see no reason why the ordinances are not 'readily subject to a narrowing construction by the state courts.' Since there is surely a vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and since the limited amount of uncertainty in the ordinances is easily susceptible of a narrowing construction, we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the court." (*Id.*, at p. 61.)

While the phrase "other sexual excitement and sexual conduct" similarly lacks specificity, we do not find it so inherently vague as to pose a "real and substantial" threat to the free exercise of First Amendment rights. As in *Young*, most books and films will either clearly fall within the scope of the ordinance or not. Examples of "sexual excitement or sexual conduct" are specifically enumerated in the ordinance, providing guidelines which can be used to construe the more general language of the law. (*People v. Hernandez* (1978) 90 Cal.App.3d 309,315.) And any remaining ambiguity can, in our view, be readily clarified by a "narrowing construction" in the state courts without insuperable difficulty.

We perceive other ambiquities in the ordinance. For instance, a theatre showing films "twenty five percent or more of the number of which" depict sexual conduct, qualifies as an "adult theatre" and is subject to the zoning provisions of the ordinance. The ordinance, however, fails to specify whether the 25 percent figure applies to films containing only isolated depictions of sexual conduct or those distinguished or characterized by an emphasis

upon depictions of such conduct. While the ambiguity is troubling, we construe it narrowly as applying only to films which fall within the latter description (*Kuhns v. Board of Supervisors* (1982) 128 Cal.App.3d 369, 375). So doing, we conclude that the challenged language does not so threaten First Amendment rights as to permit a challenge to its clarity by an enterprise such as Adult Books, Inc., which uncontestably falls within its regulatory scope. We accordingly find that appellant lacks standing to challenge the ordinance on vagueness grounds. (*Young, supra*, at p. 61; *Basiardanes v. City of Galveston, supra*, 682 F.2d 1203, 1211-1212; *Castner* v. *City of Oakland* (1982) 129 Cal.App.3d 94, 98; *Walnut Properties, Inc.* v. *City Council* (1980) 100 Cal.App.3d 1018, 1072.)

Appellant also contends that the ordinance violates its First Amendment rights. The basis of this argument is that the zoning provisions of the ordinance are overly broad in scope and effect and hence unduly restrictive of public access to protected material.[3]

It is of course established beyond cavil that the distribution of books or operation of a picture arcade is an activity entitled to First Amendment protection. (*Schad v. Mount Ephraim* (1980) 452 U.S. 61, 65; *People v. Glaze* (1980) 27 Cal.3d 841, 846; *Osmond v. EWAP Inc.* (1984) 153 Cal.App.3d 842, 853.) The fact that such businesses operate to make a profit or may "exhibit pictures which are offensive or lacking in social worth" does not deprive them of First Amendment rights. (*People v. Glaze, supra*, at p. 846; see also *Spiritual Psychic Science Church v. City of Azusa* (1984) 155 Cal.App.3d 1067, 1086; *Osmond, supra*, at p. 843.)

Any law which imposes a prior restraint on the exercise of First Amendment rights comes to the court with a "heavy presumption against its constitutional validity." (*Vance v. Universal*

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[3] Since appellants are challenging the impact of the ordinance upon their own rights of expression, they have undisputed standing to argue that the ordinance is invalid under the First Amendment. (*Schad v. Mount Ephraim, supra*, 452 U.S. 61, 66; *Basiardanes v. City of Galveston, supra*, 682 F.2d 1203, 1210.)

Amusement Co. (1980) 445 U.S. 308, 317; *Rosen v. Port of Portland* (9th Cir. 1981) 641 F.2d 1243, 1 0246-1247; *Kuhns v. Board of Supervisors, supra,* 128 Cal.App.3d 369, 374.) Freedom of speech enjoys a "preferred position" under the law (*People v. Glaze, supra,* 27 Cal.3d 841, 845; *People v. Katrinak* (1982) 136 Cal.App.3d 145, 151). Legislation which is alleged to regulate or infringe upon First Amendment rights will be subjected to closest scrutiny. (*Rosen, supra,* at p. 1246; *City of Whittier v. Walnut Properties, Inc.* (1983) 149 Cal.App.3d 633, 641.); and the government has the burden of showing not only that such a law furthers some important or substantial governmental interest unrelated to the suppression of free expression, but also that it is narrowly fashioned to ensure the least possible restriction on First Amendment rights in the protection of the governmental interest. (*United States v. O'Brien* (1968) 391 U.S., 367, 377; *People v. Glaze, supra,* at p. 846; *County of Sacramento v. Superior Court* (1982) 137 Cal.App.3d 448, 454; *People v. Katrinak, supra,* at p. 151; *EWAP, Inc. v. City of Los Angeles* (1979) 97 Cal.App.3d 179, 189.) As the court noted in *Schad v. Mount Ephraim Hospital, supra,* 452 U.S. 61, at pp. 75-76: "To be reasonable, time, place, and manner restrictions not only must serve significant state interests but also must leave open adequate channels of communication." (See also *City of Whittier v. Walnut Properties, Inc., supra,* 149 Cal.App.3d 633, 641.)

We readily acknowledge the legitimate and substantial concern the City of Vallejo has in protecting the moral aesthetic and commercial quality of its neighborhoods and commerce by restricting "adult" businesses to designated areas. Contained within the ordinance is a finding by respondent city council that the purpose of the new zoning provisions is to "alleviate" the "adverse impact" of "adult theatres and adult bookstores . . . on the tone of commerce in the city generally." (Vallejo Mun. Code, § 16.57.020 Q.)[4] Appellant, however, complains that respondent

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[4] Section 16.57.020 Q states: "The City council finds that adult bookstores and adult theaters . . . have an adverse impact on the tone of commerce in the city generally. They cause mental distress and anguish to nearby residents; they attract undesirable persons who pose dangers to school children and who interfere with adjoining businesses; adult

has failed to show any *factual* basis for its finding or otherwise support its claimed purpose by proof in the record. The law does not require such proof. The justification for zoning laws locating adult businesses in specified areas can be based upon past experience and evidence offered in similar cases. (*Strand Property Corp. v. Municipal Court* (1983) 148 Cal.App.3d 882, 887; *County of Sacramento v. Superior Court, supra,* 137 Cal.App.3d 448, 455.) A city's interest in maintaining the quality of its civic life "must be accorded high respect" (*Young v. American Mini Theatres, supra,* 427 U.S. 50, 71). Since in our view the assertion of that interest by the City of Vallejo in the present instance is free from motives of censorship or suppression, and is actuated by legitimate concerns over proper city planning, we find in the present record sufficient justification for the challenged regulations. (*Ibid.;* see also *Strand, supra,* at p. 887; *County of Sacramento, supra,* at p. 455; *Pringle v. City of Covina* (1981) 115 Cal.App.3d 151, 162; *Walnut Properties, Inc. v. City Council, supra,* 100 Cal.App.3d 1018, 1023.)

It remainds for us to examine the effect of the challenged legislation upon freedom of expression. (*Schneider v. State* (1939) 308 U.S. 147, 161; *Basiardanes v. City of Galveston, supra,* 682 F.2d 1203, 1214; *Strand Property Corp. v. Municipal Court, supra,* 148 Cal.App.3d 882, 887.) As we have said, legislation of this character must be narrowly drawn, the test being "whether there are 'less drastic means' available to accomplish the government's purpose." (*People v. Glaze, supra,* 27 Cal.3d 841, 847.) "An ordinance must be narrowly directed at the evil being attacked if First Amendment activity is involved." (*Id.*, at p. 848.)

In *Young v. American Mini Theatres, supra,* 427 U.S. 50, the United Stated Supreme Court was called upon to determine the constitutionality of a Detroit zoning ordinance which provided that adult movie theatres could not locate within 1000 feet on any

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bookstores, when placed on major thoroughfares, tend to downgrade the image of the City and to make it a less desirable place to work and live."

other two regulated uses.[5] The Court held that Detroit's zoning ordinance was a legitimate "limitation on the place where adult films may be exhibited," (*id.*, at p. 71), explaining that the "market for this commodity is essentially unrestrained" (*id.*, at p. 62). The plurality opinion acknowledged, however, that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to lawful speech." (*Id.*, at p. 71, fn. 35; see also *Bayside Enterprises, Inc. v. Carson* (1978) 450 F.Supp. 696, 701.) The concurring opinion of Mr. Justice Powell[6] focused upon the effect of the legislation, concluding that the impact of the Detroit ordinance was merely "incidental and minimal," not having the "effect of suppressing production of or, to any significant degree, restricting access to adult movies. (*Id.*, at pp. 77-79.)

Subsequently, in *Schad v. Mount Ephraim, supra*, 452 U.S. 61, the high court struck down a zoning ordinance which had the effect of excluding all non-obscene nude dancing in the Borough of Mount Ephraim. The court there emphasized that legislation regulating free expression "must not only assess the substantiality of the governmental interests asserted but also determine whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment." (*Id.*, at p. 70.) Distinguishing *Young* on the ground that the Detroit ordinance "did not affect the number of adult movie theatres that could operate in the city," (*id.*, at p. 71.), the court concluded that "[t]he Borough has not established that its interests could

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[5] The zoning ordinance was an amendment to an anti-skid row ordinance that had been adopted 10 years earlier by the Detroit Common Council. The amendment added adult businesses to a group of previously regulated uses such as cabarets, hotels, bars, pawn shops, pool halls, public lodging houses, second-hand stores, shoeshine parlors and taxi dance halls. (*Young, supra,* at p. 52.)

[6] Since there is no majority without Mr. Justice Powell's vote, his views and criteria must be satisfied if a zoning ordinance is to withstand First Amendment scrutiny, as subsequent cases have acknowledged. (*Avalon Cinema Corp. v. Thompson* (8th Cir. 1981) 667 F.2d 659, 662.)

not be met by restrictions that are less intrusive on protected forms of expression." (*Id.*, at p. 74.)

Thus, the crucial inquiry here becomes: what impact will the ordinance have upon access to protected expression. Among relevant factors in measuring that impact, the following are significant. First, respondent's ordinance is broad—facially broader than the Detroit zoning law at issue in *Young*. An "adult bookstore" or "adult theatre" is not only prohibited within 1000 feet of another such regulated use, but must be located within one of three specified zoning districts and cannot operate within 500 feet of numerous other enumerated uses, such as playgrounds, parks, libraries, schools or residential zones. Such zoning and linear distance requirements are rather more restrictive than those prescribed by the Detroit ordinance. (*Bayside Enterprises, Inc. v. Carson, supra,* 450 F.Supp. 626.) Moreover, the ordinance has no grandfather clause permitting preexisting nonconforming uses to continue operations, as do most of the valid zoning regulations enacted in the wake of *Young*. (*Avalon Cinema Corp. v. Thompson, supra,* 667 F.2d 659, 662; *Purple Onion, Inc. v. Jackson, supra,* 511 F.Supp. 1207, 1224.) Here, the ordinance is applicable to all existing businesses, making its impact upon access to protected material more substantial. (*Ibid.*)

Still, the ordinance does not impose an outright ban; "[i]t is a content-neutral regulation of the time, place, and manner of protected speech, not a direct abrogation or infringement of First Amendment rights." (*County of Sacramento v. Superior Court, supra,* 137 Cal.App.3d 448, 453; see also *EWAP, Inc. v. City of Los Angeles, supra,* 97 Cal.App.3d 179, 188-190.) Permissible locations available to adult uses are restricted by the ordinance, but not legislated out of existence.

While evidence of the impact of the ordinance upon public access to adult theatres and bookstores was disputed, we think respondent established doubt the existence within the city of reasonably available sites conforming to the zoning and distance requirements of the ordinance for operation of "adult bookstores" and "adult theatres," thereby meeting its burden of demonstrating the absence of a governmental attempt at suppression of First Amendment activity. We are mindful that appellant produced by

expert testimony evidence of the considerable economic difficulty of locating "adult" uses at many legally permissible sites within the City of Vallejo. Such evidence, however, falls far short of establishing that appellant is foreclosed or unreasonably restricted by the ordinance from effectively operating within the city limits. The issue is one of degree, and we are satisfied that the limitations based upon prospective relocation are not onerous. We are also convinced that the ordinance will not result in an oppressive and hence unconstitutional restriction of public access to adult material as found, for example, in *Alexander v. City of Minneapolis* (D.C. Mn 1982) 531 F. Supp 1162, affirmed 698 F.2d 936, and *Purple Onion, Inc. v. Jackson, supra,* 511 F.Supp. 1207, cases relied upon by appellant. We accordingly conclude that the ordinance is not so pervasive in its constraints as to violate appellant's First Amendment rights. (*Castner v. City of Oakland, supra,* 129 Cal.App.3d 94, 98; *Walnut Properties, Inc. v. City Council, supra,* 100 Cal.App.3d 1018, 1023.)

Appellant's final contention is that the conditional use permit requirements of the ordinance are unconstitutionally broad, vesting excessive discretion in municipal authorities, but this issue has been mooted by an amendment to the ordinance eliminating the permit requirement. We thus decline to consider it. (*Paul v. Milk Depots, Inc.* (1962) 62 Cal.2d 129, 132; *Consol. etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863.)

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

Newsom, J.

I CONCUR:

Holmdahl, J.

Concurring Opinion

Since it is clear that appellants lack the necessary standing to challenge the ordinance on grounds of vagueness and overbreadth, I do not interpret the majority opinion as having decided that constitutional issue; with that reservation, I join in the result reached by the majority.

Racanelli, P. J.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

July 17, 1985

I have this day filed Order

_____
_____
_____
_____
_____
_____

In re: _____ No. A021042

City of Vallejo
vs.
Adult Books, Etc.

Respectfully,

Clerk

REVIEW DENIED

In the Superior Court of the State of California
in and for the County of Solano

No. V02157

City of Vallejo,

Plaintiff,

vs.

Adult Books Etc., Books, Etc., Peek-A-Rama, Sonoma Investment Corp., John Roth, Ona Roth, Lewis Brown, Dorothy Jean Brown, and Does I through XX,
Defendants.

REQUEST FOR STATEMENT OF DECISION

[Filed Sept. 23, 1982]

Defendants request a statement of decision on the following issues:

1. Whether the Vallejo Zoning Code denies defendants free speech, due process or equal protections under the U.S. or California Constitutions.

2. Whether the Vallejo Zoning Code has the effect of oppressing or greatly restricting access to non-obscene print and film media relating to sex.

3. Whether the Vallejo Zoning Code constitutes a prior restraint on defendants' constitutional rights.

4. Whether the Vallejo Zoning Code conditional use permit provisions are overbroad and vague and vest unfettered discretion in governmental officials.

5. Whether the Vallejo Zoning Code invidiously discriminates against defendants.

Dated: September 22, 1982

ARTHUR WELLS, JR.
A Professional Corporation

By /s/ ARTHUR WELLS, JR.
Arthur Wells, Jr.

In the Superior Court of the State of California

In and For the County of Solano

No. V02157

City of Vallejo, a Municipal Corporation,
Plaintiff,

vs.

Adult Books Etc., Books, Etc., Peek-A-Rama, Sonoma Investment Corp., John Roth, Ona Roth, Lewis Brown, Dorothy Jean Brown, and Does I through XX,
Defendants.

Objections to Statement of Decision

[Filed Dec. 1, 1982]

Defendants object to the Statement of Decision proposed by plaintiff, as follows:

1. The assertions contained in the second paragraph on page 4 of the Statement are untrue and are not supported by the evidence.

2. Each of the paragraphs under the "Statement of Decision" commencing on page 4, line 19 are inaccurate and untrue.

(a) The ordinance greatly restricts access to non-obscene adult materials.

(b) The ordinance vests excessive discretion in governmental officials even as redrafted by the trial court.

(c) The ordinance invidiously discriminates against defendants.

(d) The ordinance imposes a prior restraint on defendants.

3. Defendants have admitted that they meet the definition for "adult" use set out in the Vallejo Ordinance *as drafted.* But the ordinance as drafted is unconstitutional. Defendants have not admitted that they meet *all possible or constitutional* definitions of "adult" uses. They therefore have standing to raise issues of

overbreadth and vagueness. The Vallejo ordinance is patently vague and overbroad.

4. Plaintiff has submitted no evidence demonstrating that the Vallejo ordinance as drafted is narrowly drawn and necessary to carry out any legitimate municipal goal. The City has not shown that it has a "blight" problem, that a footage restriction is necessary or that the zone restrictions set forth are necessary to carry out any of its goals. See *Young v. American Mini Theaters,* 427 U.S. 50, 49 L. ed 2d 310 (1976), Powell, J., concurring; *Purple Onion v. Jackson,* 511 F. Supp. 1207 (1981); *Avalon Cinema Corp. v. Thompson,* 667 F. 2d 659 (1981); *Schad v. Borough of Mt. Ephraim,* ____ U.S. ____, 68 L. ed 2d 671 (1981).

Dated:_____.

ARTHUR WELLS, JR.
A Professsional Corporation

By ARTHUR WELLS, JR.
Arthur Wells, Jr.

Portions of Petitioner's Trial Brief

* * *

II

THE DEFINITIONS OF "ADULT BOOKSTORE" AND "ADULT THEATER" IN THE VALLEJO ZONING ORDINANCE ARE UNCONSTITUTIONAL.

Under the Section 16.04.011 Ordinance, an "adult bookstore" is defined as follows:

* * *

"Adult theater" is defined in Section 16.04.012 as follows:

* * *

However, defendants contend that the definitions are overbroad and vague and therefore unconstitutional.

Motion pictures and bookstores are protected by the First Amendment to the U.S. Constitution. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 96 L. ed. 1098 (1952).

Because such activities enjoy special constitutional protection, ordinances which seek to regulate such activities are subject to "strict scrutiny".

* * * *

This "strict scrutiny" test means that such ordinances must be definite and precise. *Barry v. Oceanside*, 107 C.A. 3d 257 (1980).

The strict scrutiny test is applied by California Courts and the U.S. Supreme Court to zoning ordinances. *Imperial Beach v. Palm Avenue Books, Inc., supra; Schad v. Borough of Mt. Emphriam*, ____U.S.____, 68 L. ed. 2d 671 (1981).

Such ordinances must further a substantial governmental interest and must be as narrowly drawn as possible.

* * * *

Schad v. Borough of Mt. Ephriam, supra. (And cases therein cited) Further, such ordinances bear a heavy *presumption of unconstitutionality. Kuhns v. Board of Supervisors, supra; EWAP v. Los Angeles*, 97 C.A. 3d 179 (1979).

Schad emphasizes the narrowness requirement. Quoting from *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 63 L. Ed. 2d 73 (1980), the *Schad* court emphasized that it must not only assess the substantiality of the governmental interests asserted, but also determine whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment:

* * *

An ordinance is unconstitutionally vague if its prohibitions are not clearly defined. *Pringle v. City of Covina, supra, Grayed v. City of Rockford,* 408 U.S. 104, 33 L. ed. 2d 222 (1972); *Hynes v. Major of Orodell,* 425 U.S. 610, 48 L. ed. 2d 243 (1976). The terms "sexual excitement" and "sexual conduct" are vague.

* * * *

In summary then:

1. The definition of "adult bookstore" and "adult theater" is vague because one cannot determine what materials are includable as those which "describe or depict . . . other sexual excitement or sexual conduct".

2. The zoning ordinance is overbroad because its definition of adult bookstore and theater includes a large number of businesses for which no legitimate reason for regulation has been shown. The definition now includes all businesses where 25% or more of the material or films in question depict *any* sexual excitement or sexual conduct. This catagory is too broad.

* * * *

III

THE VALLEJO ZONING CODE SUPPRESSES AND GREATLY RESTRICTS ACCESS TO LEGAL SEXUAL MATERIALS AND IS THEREFORE UNCONSTITUTIONAL.

In *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 49 L. ed. 2d 310 (1976), the United States Supreme Court was faced with the question of the constitutionality of a Detroit zoning ordinance specifically directed at regulating the locations of adult uses. Both the majority opinion written by Justice Stephens and the concurring opinion of Justice Powell held that the ordinance was constitutional because, among other reasons, it did not suppress the production of or, to any significant degree, restrict access to adult sexual material. *Id.*, 427 U.S. at 77, 49 L. ed. 2d at 330. However, the court indicated that the situation would be quite different "if the ordinance had the effect of suppressing or greatly restricting access to lawful speech". *American Mini Theaters, supra*, 427 U.S. at 72 n.35, 49 L. ed. 2d at 327.

In *Schad v. Borough of Mt. Ephriam*, ____ U.S. ____, 68 L. ed. 2d 671 (1981) the court, in discussing *American Mini Theaters*, pointed out that the result there was reached because the Detroit ordinance imposed "a minimal burden on protected speech". Justice White, writing for the court in *Schad*, emphasized that the *American Mini Theater* majority opinion had found that there were "myriad locations" within Detroit where new adult uses could be located. He also emphasized that Justice Powell found Detroit's impact on First Amendment activities to be incidental and minimal. It is thus clear that the Supreme Court is interested in and pays close attention to the *effect* of zoning ordinances on First Amendment activity, and that when the effect of those ordinances is to greatly restrict access to sexual materials, the court will strike down the ordinances.

* * *

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PETITION FOR REVIEW

To the Chief Justice of the California Supreme Court and to the Associate Justices:

Defendants, appellants, and petitioners petition this court to grant a writ of review herein in order to settle important questions of law and because it appears necessary to secure uniformity of decision.

ISSUES PRESENTED

The issues presented by this case are as follows:

1. May a city restrictively zone adult bookstores and theaters and require existing such businesses to relocate without a factual showing that its zoning scheme is necessary to further a compelling governmental interest and is the narrowest least onerous alternative regulation of those business possible?

2. If a city adopts restrictive zoning which limits where adult bookstores and theaters may locate and requires existing such businesses to relocate, does it bear the burden of establishing that suitable locations are available for such businesses?

3. Is an ordinance which defines as "adult" all books and films which depict "sexual excitement" or "sexual conduct" or specific acts unconstitutionally vague or overbroad or both?

4. Does such an ordinance give unfettered discretion to zoning officials to determine if businesses selling such materials are "adult" and, therefore, give such officials unfettered discretion to control the location of such businesses?

5. Is an ordinance which restrictively zones bookstores and theaters if 25% or more of their stock depicts "sexual excitement" or "sexual conduct" constitutionally overbroad?

6. Does the Vallejo zoning ordinance here in question significantly restrict access to non-obscene sexually explicit books and films?

STATUTES

16.22.010 Title and purpose

The purpose of Section 16.22.010 through Section 16.22.060, inclusive, is to create and establish regulations for a linear commercial district, in which well-designed, community-level commercial areas are developed along major thoroughfares. As described in the land use element of the Vallejo general plan, commercial strip areas are often problem areas, frequently characterized by clogged streets, lack of parking, haphazard siting of commercial establishments, and inconvenient access. The intent of this district is to implement the goal of the land use element of the general plan which calls for the preservation and maintenance of healthy commercial strip areas, and the gradual removal of those that are poorly situated and no longer appropriate for commercial use. Typically, the linear commercial district would be applied to commercial areas near intersections of major thoroughfares and would be used to mitigate the problems identified in the land use element of the general plan.

Where a proposed land use is encompassed by the definition of this district's permitted use types but conflicts with the statement of purpose for this district, the proposed land use will not be permitted. (Ord. 558 N.C.(2d) § 2 (part), 1980.)

16.22.020 Permitted uses.

The following uses are permitted:

A. Civic use types.

1. Essential services.

B. Commercial use types.

1. Administrative and professional services;

2. Animal sales and services: grooming;

3. Automotive and equipment: parking;

4. Business equipment sales and services;

5. Communication services;

6. Finance, insurance, and real estate services;

7. Funeral and interment services: undertaking;
8. Laundry services;
9. Participant sports and recreation: outdoor;
10. Repair services: consumer;

* * * *

4. Funeral and interment services: cremating;
5. Funeral and interment services: interring;
6. Gasoline sales;
7. Medical services;
8. Participant sports and recreation: indoor;
9. Spectator sports and entertainment: limited;
10. Spectator sports and entertainment: general;
11. Wholesaling, storage and distribution light;
12. Automotive and equipment: repairs, light equipment.

(Ord. 633 N.C.(2d) § 1, 1982; Ord. 595 N.C.(2d) § 9, 1981: Ord. 558 N.C.(2d) § 2(part), 1980.)

ZONING

Chapter 16.24

16.24.0101 Title and purpose.

The purpose of Section 16.24.010 through Section 16.24.060, inclusive, is to create and establish regulations for a pedestrian shopping and service district, in which a wide range of retail goods and services are permitted. The intent of this district is to implement the policy of the land use element of the Vallejo general plan which calls for the development of pedestrian-oriented commercial shopping areas that allow comparison shopping within relatively compact areas. Typically, the pedestrian shopping and service district would be applied in the central business district (CBD) of a community, or in commercial shopping centers including variety stores and often small depart-

ment stores. Characteristic design features would include a continuous facade, grouped parking, and the siting of proposed structures and signs in a manner compatible with the pedestrian orientation of this district.

Where a proposed land use is encompassed by the definition of this district's permitted use types but conflicts with the statement of purpose for this district, the proposed land use will not be permitted. (Ord. 558 N.C.(2d) § 2 (part), 1980.)

16.24.020 Permitted uses.

The following use types are permitted:

A. Civic use types.

1. Administrative services;

ZONING

16.24.040 Uses subject to a major use permit.

The following use types are permitted upon issuance of a major use permit, as provided in Chapter 16.82:

A. Civic use types.

1. Ambulance services;

2. Major impact services and utilities;

3. Religious assembly.

B. Commercial use types.

1. Automotive and equipment: cleaning;

2. Gasoline sales;

3. Medical services;

4. Participant sports and recreation: indoor;

5. Spectator sports and entertainment: limited;

6. Spectator sports and entertainment: general. (Ord. 633 N.C. (2d) § 2, 1982; Ord. 558 N.C. (2d) § 2 (part), 1980.)

ORDINANCE NO. 649 N.C. (2d)

Section 16.08.010. Listing of basic zoning districts.

The city is divided into the following basic zoning districts, which are described in Chapter 16.10 through Chapter 16.34, inclusive.

Symbol	District Name
RC	Resource Conservation District
RR	Rural Residential District
LDR	Low Density Residential District
MDR	Medium Density Residential District
HDR	High Density Residential District
LO	Limited Office District
PO	Professional Offices District
C-N	Neighborhood Shopping and Service District
C-L	Linear Commercial District
C-P	Pedestrian Shopping and Service District
C-W	Waterfront Shopping and Service District
C-F	Freeway Shopping and Service District
M	Medical District
I-U	Intensive Use District

Section 16.24.030. Permitted uses subject to limitations.

The following use types are permitted subject to the applicable provisions of Chapter 16.57 (the letter in parentheses following the use type refers to the subsection of Section 16.57.020 which applies):

A. Residential use types

1. Family residential (B).

B. Commercial use types.

1. Automotive and equipment: repairs, light equipment. (G);

2. Automotive and equipment: sales/rental, light equipment (H);

3. Eating and drinking establishments (J)(K);

4. Food and beverage retail sales (L);

5. Personal services: general (M);

6. Retail sales: general (Q)."

16.34.010. Title and purpose.

The purpose of Section 16.34.010 through Section 16.34.060, inclusive, is to create and establish regulations for an intensive use district, in which a wide range of commercial services, manufacturing, and wholesale storage and distribution can be undertaken in close proximity to one another without encroachment or disturbance of incompatible land uses. Typically, the intensive use district would be applied to areas where sufficient acreage is available for screening and buffering unsightliness, noise, odor, traffic and hazards associated with intensive uses from less intense districts and public rights-of-way. If screening or buffering cannot be provided as a result of existing site constraints, then the uses will be limited to those that are completely enclosed within a building. Supportive uses, such as certain retail sales and eating and drinking establishments, would be appropriate if properly oriented and are serving primarily the general commercial and industrial uses. Most of the uses listed in Section 16.34.030 fall in this category.

Where a proposed land use is encompassed by the definition of this district's permitted use types but conflicts with the statement of purpose for this district, the proposed land use will not be permitted.

16.34.020. Permitted uses.

The following use types are permitted:

A. Civic use types.

1. Ambulance services;

2. Essential services;

3. Major impact services and utilities;

4. Parking services;

5. Postal services.

B. Commercial use types.

1. Automotive and equipment: parking;

2. Automotive and equipment: repairs, light equipment;

3. Automotive and equipment: repairs, heavy equipment;

4. Automotive and equipment: sales/rental, light equipment;

5. Automotive and equipment: sales/rental, heavy equipment;

6. Business equipment sales and services;

7. Business support services;

8. Construction sales and services;

9. Funeral and interment services: cremating;

10. Laundry services;

11. Wholesaling, storage, and distribution: light;

12. Wholesaling, storage, and distribution: heavy.

C. Industrial use types.

1. Custom manufacturing;

2. General industrial.

16.34.030. Uses subject to limitations.

The following use types are permitted subject to complying with the intent and purpose of this chapter and to the applicable provisions of chapter 16.57 (the letter in parentheses following the use types refers to the subsection or Section 16.57.030 which applies):

A. Civic use types.

1. Administrative services;

2. Clinic services.

B. Commercial use types.

1. Animal sales and services: kennels(D);

2. Automotove and equipment: cleaning (F);

3. Convenience sales and personal services;

4. Eating and drinking establishments (J) (K);

5. Food and beverage retail sales (L);

6. Participant sports and recreation: indoors;

7. Retal sales: general (Q);

16.57.020 Applicability.

The following limitations shall apply to uses indicated by the corresponding letter in parentheses in the previous sections entitled "Permitted uses subject to limitations."

A. Family residential. All mulitiple dwelling developments of three to eight units, inclusive, shall be subject to review by the planning department as prescribed in Chapter 16.90, Site Development Plan Approval. All multiple dwelling developments of nine or more units and all condominium projects shall be subject to review by the planning commission, as prescribed in Chapter 16.82, Conditional Use Permit Procedure.

B. Family residential. Dwelling units shall be permitted only when located on other than the street level of the building; except in the waterfront shopping and service district where ground level dwelling units associated with the waterfront may be permitted, upon issuance of a major use permit, as prescribed in Chapter 16.82.

C. Cultural exhibits and library services. Limited to marine museums and marine-related exhibits.

D. Animal sales and services: kennels. There shall be no kennels within two hundred feet of a residential use or residentially zoned district.

E. Animal sales and services: veterinary (small animals). There shall be no veterinary facilities within two hundred feet of a residential use or residentially zoned district.

F. Automotive and equipment: cleaning. There shall be no automated car washes located within two hundred feet of any residential use or residentially zoned district.

G. Automotive and equipment: repairs, light equipment. Limited to activities conducted indoors and accesory to retail uses.

H. Automotive and equipment: sales/rental, light equipment. Limited to activities conducted indoors.

I. Business equipment sales and services. Limited to establishments dispensing marine products, supplies, and services.

J. Eating and drinking establishments. There shall be no eating and drinking establishments offering alcoholic beverages for on-premises consumption when located within two hundred feet of a residential use or residentially zoned district; except upon issuance of a major use permit, as prescribed in chapter 16.82. Eating and drinking establishments offering alcoholic beverages for off-premises consumption, regardless of location, shall be subject to a major use permit.

K. Eating and drinking establishments. All drive-in and other fast-food restaurants are subject to a major use permit, as prescribed in Chapter 16.82.

L. Food and beverage retail sales. Food and beverage retail establishments offering alcoholic beverages for off-premises consumption are subject to a major use permit, as prescribed in Chapter 16.82.

M. Personal services: general. The following uses are subject to a major use permit, as prescribed in Chapter 16.82: any practice of massage, alcohol rub, or similar treatment, fomentation, bath, or electric or magnetic treatment; except when such offices are an integral part of and operated by a hospital, convalescent home, sanitarium, medical clinic, medical laboratory, medical education facility, or other medical facility licensed as such by the state or other competent and lawful authority.

N. Personal sevices: general. The following uses are not permitted: any practice of massage, alcohol rub, or similar treatment, fomentation, bath, or magnetic treatment; except when such offices are an integral part of and operated by a hospital, convalescent home, sanitarium, medical clinic, medical labora-

tory, medical education facility, or other medical facility licensed as such by the state or other competent and lawful authority.

O. Repair services: consumer. Consumer repair services excludes appliance, radio and T.V. repair shops within this district.

P. Repair services: consumer. Limited to establishments dispensing marine products, supplies, and services.

Q. Retail sales: general. Adult bookstores or theaters, as defined in Sections 16.04.011 and 16.04.012, are subject to a major use permit, as prescribed in Chapter 16.82.

R. Retail sales: general. Adult bookstores or theaters, as defined in Sections 16.04.011 and 16.04.012, are prohibited.

S. Wholesale, storage and distribution: light. The storage of equipment or materials out-of-doors shall be permitted when screened from view from public streets and other dissimilar uses, as prescribed in Chapter 16.70, Screening and Landscaping.

T. Animal raising. Animal raising shall exclude animal feed yards and the keeping of hogs and turkeys.

U. Custom manufacturing. Must be in conjunction with retail sales.

V. Automotive and equipment: repairs, heavy equipment; automotive and equipment: sales/rentals, heavy equipment. Limited to boat sales and service. (Ord. 595 N.C.(2d) § 11, 1981; Ord. 558 N.C.(2d) § 2 (part), 1980.)

16.82.050 Required findings.

The planning commission or the zoning administrator, as is appropriate, shall grant a conditional use permit only if from the facts presented with the application or at the public hearing, or as determined by investigation, the following conditions have been found:

A. That the location, size, design and operating characteristics of the proposed conditional use will be compatible with adjacent uses, building or structures, with consideration given to harmony in scale, bulk, coverage, and density; to the availability of civic facilities and utilities, to the harmful effect, if any, upon

desirable neighborhood character; to the generation of traffic and the capacity and physical character of surrounding streets; and to any other relevant impact of the proposed use;

B. That the impacts, as described in subsection A of this section, and the location of the proposed conditional use are consistent with the city general plan. (Ord. 558 N.C.(2d) § 2 (part), 1980.)

16.82.060 Standards and criteria for certain conditionally permitted uses.

A. Adult bookstores and adult theaters shall:

1. Be located at least five hundred feet from any residential zoning district, or at least five hundred feet from the property line of any public or private school, library, park or playground;

2. Be located at least one thousand feet from any adult bookstore or adult theater;

3. Cover all windows, doors and other apertures with screens or other devices so as to prevent the viewing of the interior of the establishment from without, and such screening shall be of a neutral or earth-tone color.

4. Not display books, magazines, photographs, or any other item offered for sale to the open view of passersby; in the case of adult theaters, not display movie advertising poster showing the areola of any female breast, or any buttocks or genitalia of any adult person to the open view of passersby.

5. The city council finds that adult bookstores and adult theaters (as defined in Sections 16.04.011 and 16.04.012) ave an adverse impact on the tone of commerce in the city generally. They cause mental distress and anguish to nearby residents; they attract undesirable persons who pose dangers to school children and who interfere with adjoining businesses; adult bookstores, when placed on major thoroughfares, tend to downgrade the image of the city and to make it a less desirable place to work and live. The regulations contained in this section have been enacted to alleviate these impacts. Any adult bookstore or adult theater in existence on March 1, 1978, shall comply with the requirements

of this section by at least March 1, 1979, unless any such adult bookstore or theater shall comply with the said requirements immediately. The planning commission, upon a showing of extreme hardship, may, at public hearing, grant a one-year extension of the time period specified in this section.